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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. BRIAN C. COBLER, Defendant-Appellant.	)	NO. 34308 APPELLANT'S BRIEF

COPY

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APR 10 2008
Supreme Court ____ Court of Appeals ____
Entered on ATS by: ____

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

In this case, Brian Cobler asks this Court to revisit the proper analysis for a claim that a criminal statute is void for vagueness on its face. This Court has previously held that, for some criminal statutes, the proper enquiry for whether the statute is facially vague is whether the reviewing court can identify a core of circumstances to which the statute could be lawfully applied and whether the law is vague in all of its applications. *See State v. Hellickson*, 135 Idaho 742, 745, 24 P.3d 59, 62 (2001); *State v. Bitt*, 118 Idaho 584, 587-588, 798 P.2d 43, 46-47 (1990). Mr. Cobler asserts that this standard of review is not proper when the statute being challenged as facially vague is a criminal statute.

Mr. Cobler pleaded guilty to sexual battery of a minor child, sixteen or seventeen years of age and received a unified sentence of ten years, with two years fixed. Mr. Cobler appeals, asserting that the district court imposed an excessive sentence, and thereby abused its discretion, and that the district court abused its discretion when it denied his Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion for a reduction of sentence. Mr. Cobler also challenges the no contact order entered against him as vague, overbroad, unduly restrictive of his parental rights, and outside the scope of the authority granted pursuant to I.C. § 18-920 and I.C.R. 46.2. As such, Mr. Cobler asserts that the district court abused its discretion when it entered the criminal no contact order against him and when the court denied his motion to modify the no contact order entered against him.

Statement of the Facts & Course of Proceedings

Police received a report that Brian Cobler and his wife were sexually involved with a seventeen year old girl. (Presentence Investigation Report (*hereinafter,* PSI), p.2.) The parents of the victim were the persons who filed the report with police. (PSI, p.2.) The victim's parents discovered the sexual relationship when they found love letters, emails, and pictures that indicated their daughter was sexually involved with Mr. Cobler and his wife. (PSI, p.2.) As a result of the report from the victim's parents, police searched Mr. Cobler's residence and his wife's car and found notes to the girl along with sexually explicit material. (PSI, p.2.)

Upon Mr. Cobler's arraignment, the district court entered a no contact order that precluded Mr. Cobler from contacting the victim and "all minors." (10/17/06 Tr., p.6, L.9 – p.7, L.8; R., p.7.) Given that the order prohibited contacts with "all minors," the order precluded Mr. Cobler from having any contact or making any attempt to contact his three children. (R., p.7; PSI, p.15.) Among the contacts prohibited by the terms of this order are contacts in person; through another person; in writing or email; by telephone, pager, or facsimile; attempts to contact, harass, follow, or communicate with the alleged victim or any person under the age of 18; or knowingly remaining within 100 feet of the alleged victim or any person under the age of 18. (R., p.7.) The order did not provide for any of the available exceptions, including permission for Mr. Cobler to respond to emergencies involving his own children. (R., p.7.) And nothing in the no contact order provides any exception for inadvertent or incidental contacts. (R., p.7.) There was no date provided for the expiration of this no contact order. (R., p.7.) The only provision

for expiration of the order was that it would expire "upon dismissal of the case." (R., p.7.)

Mr. Cobler pleaded guilty to sexual battery of a minor child, sixteen or seventeen years of age. (Tr., 2/16/07, p.6, L.13 – p.7, L.4.) Prior to imposing sentence, the district court ordered a psychological evaluation of Mr. Cobler for purposes of sentencing. (R., pp.29-30.) The district court imposed a unified sentence of ten years, with two years fixed. (Tr., 6/6/07, p.27, Ls.5-9.)

Mr. Cobler then presented the court with a Rule 35 motion for a reduction of his sentence. (Motion for Correction or Reduction of Sentence[1], pp.1-8; Motion for Reconsideration of Sentence, pp.1-2.) He also moved the court to modify the no contact order entered against him on October 17, 2006, because this no contact order precluded him from having any contact with his own children. (R., p.7; Motion to Modify Protection Order, pp.1-3.) The district court denied both motions. (Memorandum Decision Re: Defendant's Motion for Reduction of Sentence Pursuant to I.C.R. 35; Motion to Modify Protection Order, p.1.; Second Memorandum Decision Re Defendant's Motion for Reduction of Sentence Pursuant to I.C.R. 35.[2]) Mr. Cobler timely appeals.

[1] Mr. Cobler's Motion for Correction or Reduction of Sentence, Motion for Reconsideration of Sentence, and Motion to Modify Protection Order, and the district court's Memorandum Decision Re Defendant's Motion for Reduction of Sentence Pursuant to I.C.R. 35 were incorporated into the record via Mr. Cobler's Motion to Augment and Suspend the Record, filed on January 15, 2008.

[2] Mr. Cobler has sought to augment the district court's Second Memorandum Decision Re Defendant's Motion for Reduction of Sentence Pursuant to I.C.R. 35 into the record via a Motion to Augment the Record filed concurrently with this brief.

ISSUES

1. Did the district court act outside the bounds of its authority when it entered a no contact order that is unconstitutionally vague and overbroad, unduly restrictive of Mr. Cobler's fundamental right to maintain contact with his children, and invalid due to a lack of any discernible date of expiration or being limited to a named person against whom contact is prohibited; and when it denied Mr. Cobler's motion to modify the no contact order?

2. Did the district court abuse its discretion when it imposed a unified sentence of ten years, with two years fixed, upon Mr. Cobler following his plea of guilty to sexual battery of a minor child, sixteen or seventeen years of age?

3. Did the district court abuse its discretion when it denied Mr. Cobler's Rule 35 Motion for a Reduction of Sentence?

ARGUMENT

I.

The No Contact Order Entered Against Mr. Cobler Was Vague, Overbroad, Unduly Restrictive Of His Parental Rights, Contains No Date Of Expiration, And Is Entered In Favor Of A Class Of Persons Rather Than Just A Named Person; And Therefore The District Court Abused Its Discretion When It Entered The No Contact Order Against Mr. Cobler And When The District Court Denied Mr. Cobler's Motion To Modify The Order

A. Introduction

At the time of his arraignment, the district court entered a no contact order against Mr. Cobler that continues to be in force. (10/17/06 Tr., p.4, L.1 – p.7, L.14; R., p.7.) Mr. Cobler subsequently moved the court to modify the no contact order so that he would be able to have some contact with his three children. (Motion to Modify Protection Order, pp.1-3.) The court summarily denied this motion. (Motion to Modify Protection Order, p.1.)

The decision of whether to enter a no contact order pursuant to I.C. § 18-920 is a matter within the discretion of the district court. *See* I.C. § 18-920(1). However, as with any exercise of discretion on the part of the district court, that discretion must be exercised in a manner that is consistent with applicable legal standards, including constitutional standards. *See, e.g., State v. Field*, 144 Idaho 559, 568, 165 P.3d 273, 282 (2007); *State v. Braaten*, 144 Idaho 606, 607, 167 P.3d 357, 358 (Ct. App. 2007). Mr. Cobler contends that this no contact order is unconstitutionally overbroad and vague; that it is invalid because it fails to contain a date of expiration, and is entered in favor of a class of persons rather than just an identifiable individual; and that it unconstitutionally interferes with his fundamental rights as a parent. Therefore,

because the no contact order entered against Mr. Cobler is contrary to applicable law, Mr. Cobler asserts that the district court abused its discretion when it entered the no contact order and denied his motion to modify this order.

B. The District Court Failed To Act Within The Bounds Of Its Discretion When It Entered A No Contact Order Against Mr. Cobler Based On A Statute And Court Rule That Are Overbroad On Their Face And The District Court Abused Its Discretion When It Entered A No Contact Order That Was Overbroad As Applied To Mr. Cobler

Mr. Cobler contends that the language employed by the no contact order entered against him, and the statutory provisions and criminal rules that authorize the entry of criminal no contact orders, are overbroad on their face and as applied to the facts in Mr. Cobler's case. As such, the district court abused its discretion when it entered the no contact order against him, and when the district court refused to modify this order.

1. The Statute And Criminal Rule Governing Criminal No Contact Orders Are Facially Overbroad

Criminal no contact orders are authorized under I.C. § 18-920, which permits the district court to enter a no contact order when a defendant is charged with or convicted of a list of enumerated offenses, or for "any other offense for which a court finds that a no contact order is appropriate." I.C. § 18-920(1). This statute makes it a criminal offense to violate such a no contact order. I.C. § 18-920. The specific minimum requirements for issuance of such an order are enumerated in I.C.R. 46.2. Neither the statute authorizing the issuance of criminal no contact orders, nor the court rule regulating the content and manner of execution of these orders, contains any provision for inadvertent or incidental contacts. Mr. Cobler contends that, because there is no

provision for inadvertent or incidental contacts, both the relevant statute and court rule are facially overbroad.

A statute that regulates speech, association, or expressive conduct that is protected by the First Amendment is facially overbroad if a substantial number of the statute's applications are unconstitutional judged in relation to the statute's plainly legitimate sweep. *Washington State Grange v. Washington State Republican Party*, ___ U.S. ___, 128 S. Ct. 1184, 1191, n.6 (2008). This Court begins an examination of whether a statute or order is facially overbroad with first determining whether the statute regulates constitutionally protected conduct. *Broadrick v. Oklahoma*, 413 U.S. 601, 614 (1973); *State v. Korsen*, 138 Idaho 706, 714, 69 P.3d 126, 134 (2003). Here, there is no statutory definition for what constitutes "contact," but the conduct that is proscribed by no contact orders includes prohibitions against communications and associations between the person against whom the order is issued and the person for whom the order is intended to protect. Therefore, these orders operate as an injunction that prevents certain communications and associations with another individual or class of individuals. *See also* BLACKS LAW DICTIONARY, p.800 (8th ed. 2004) (defining "injunction" as a court order commanding or preventing an action).

The right to communicate and the right of association with others are among the activities that are constitutionally protected conduct under the First Amendment of the United States constitution, which is made applicable to the states through the Due Process clause of the Fourteenth Amendment. *See, e.g., U.S. v. Eichman*, 496 U.S. 310, 322 (1990) (First Amendment embraces the freedom to effectively communicate with others); *Bates v. City of Little Rock*, 361 U.S. 516, 522-23 (1960); *cf. Elk Grove*

Unified School Dist. V. Newdow, 542 U.S. 1, 17 (2004) (recognizing in dicta that a parent's right to communicate with his or her child is protected under the First Amendment). As such, criminal no contact orders regulate constitutionally protected conduct. *See also Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (treating an injunction against anti-abortion protestors as a prior restraint on speech).

Once it has been determined that the challenged statute or order regulates constitutionally protected conduct, the next step in the analysis requires a determination of whether the statute precludes a *significant* amount of constitutionally protected conduct. *Korsen*, 138 Idaho at 713, 69 P.3d at 133. If the overbreadth is substantial, the law may not be enforced against anyone until the reach of the law is narrowed by legislative action, judicial construction, or partial invalidation. *Id.* at 714, 69 P.3d at 134. However, overbreadth is not substantial if, despite some impermissible applications, the remainder of the statute covers conduct that is easily identifiable and the conduct may be constitutionally proscribed. *Id.* Because the criminal no contact orders at issue in this appeal operate as injunctions that impose a prior restraint on speech, this Court also must determine that the restraint is "no broader than necessary to achieve its desired goals." *Madsen*, 512 U.S. at 765; *see also State v. Hague*, 547 N.W.2d 173, 176 (S.D. 1996) (applying the above standard from *Madsen* to terms of a domestic violence protection order).

In this case, the relevant statute, I.C. § 18-920, and the court rule governing proper execution of no contact orders, I.C.R. 46.2, suffer from substantial unconstitutional overbreadth. There is nothing in the language of I.C. § 18-920 or I.C.R. 46.2 that restricts what crimes may be used as a basis to enter a no contact order.

There is no definition of "contact" provided in the statute, related statutes, or the court rule. *See* I.C. § 18-101 et. seq.; I.C.R. 46.2. Because there is no definition of what constitutes "contact," there are literally no guidelines as to when criminal liability may arise in the case of inadvertent or incidental contacts or contacts that are initiated without the consent or any affirmative act on the part of the individual against whom the order is entered (such as when the individual with whom contact is precluded is the individual who initiates the contact, rather than the person against whom the order is entered).

There is also no requirement of any rational relationship between the underlying offense and the person who is protected from contact by the order. *See* I.C. § 18-920; I.C.R. 46.2. The State is empowered to seek, and the district court is empowered to enter, a no contact order that could potentially encompass any individual based on the State charging a defendant with any criminal offense at all. Moreover, while I.C.R. 46.2 requires that the no contact order recite a date upon which the order terminates, the rule does not restrict how far into the future the date of expiration may extend. Without additional meaningful restrictions, the statute and court rule that govern the entry of criminal no contact orders unjustifiably preclude a significant amount of constitutionally protected conduct.

The current statute and court rule, I.C. § 18-920 and I.C.R. 46.2, permit entry of an order with terms that are far broader than necessary to achieve the State's goals. *Madsen*, 512 U.S. at 765. The statute and court rule do not delineate what specific types of contacts are prohibited or define the term "contact," do not require a relationship between the person against whom contact is prohibited and the underlying

crime, do not limit what crimes may serve as the basis for the underlying order, and do not provide any specific limitation on how long these orders are allowed to persist as enforceable. Therefore the statute and court rule are facially overbroad.

2. The No Contact Order Entered Against Mr. Cobler Is Overbroad As Applied To The Facts And Circumstances Of This Case

Assuming, *arguendo*, that this Court determines that the statute and court rule governing criminal no contact orders are not facially overbroad, the specific no contact order entered against Mr. Cobler in this case was clearly overbroad as applied to him. An as-applied challenge to a statute or rule as overbroad requires a determination of whether the statute, as applied to the individual raising the challenge, infringes on his or her speech or freedom of association as protected by the First Amendment. *See State v. Poe*, 139 Idaho 885, 893, 88 P.3d 704, 712 (2004).

The no contact order entered against Mr. Cobler is astonishingly broad in its sweep. The order precludes Mr. Cobler from having contact with the alleged victim in this case and with "all minors." (R., p.7.) A non-exclusive list of the contacts prohibited includes contact in person or through another person; in writing, email, by telephone, pager or facsimile, attempting to contact, harass, follow or communicate, or knowingly remaining with 100 feet of the victim and all minors. (R., p.7.) There is nothing in the no contact order that exempts inadvertent contacts. (R., p.7.)

A similar issue of overbreadth was recently addressed by the Iowa courts. *See State v. Hall*, 740 N.W.2d 200 (Iowa Ct. App. 2007). In *Hall*, the defendant was convicted of sexual exploitation of a minor. *Id* at 201. The court entered a no contact order as part of its sentencing order. *Id.* In terms almost identical to those at issue in

this case, the trial court precluded the defendant from having any contacts or communications with any child under 18 years of age, and also ordered that the defendant was precluded from being in the immediate vicinity of locations where children are normally found. *Id.* The provision preventing the defendant from being present in locations where children would normally be found included an exception for incidental contacts, which is an additional restriction on the defendant's potential for criminal liability that is not present in this case. *Id.*

The defendant in *Hall* challenged the provisions of the no contact order as being overbroad. *Id.* at 203. The court determined that the provision of the no contact order that prevented communication with a minor was overbroad in that it did not contain any exception for incidental contact. *Id.* at 204-205. The court noted that, without such an exception, the defendant would face a "day-to-day impossibility" in attempting to comply with the order, and that a total ban on communications "would, in effect, require Hall to become a hermit." *Id.* at 204. The court found that there was no justification for forbidding the defendant from incidental contact with minors. *Id.* at 205. Without some provision for incidental contacts, the court in *Hall* determined that the terms of the no contact order were overbroad. *Id.*

Here, there is even greater reason than in *Hall* to find that the no contact order entered against Mr. Cobler was overbroad. The offense that he pleaded guilty to did not involve young children. (Tr., 2/16/07, p.6, L.13 – p.7, L.4.) There was a specific conclusion in this case that Mr. Cobler is not a sexual predator, and he has no prior record of any sexual offense. (PSI, p.10; Psychosexual Evaluation, pp.15-16.) There is a complete absence in this record of any indication that Mr. Cobler can be reasonably

viewed as a danger to his own children, who fall within the terms of the no contact order.

Like the provision of the order found to be overbroad in *Hall*, there is also no provision in Mr. Cobler's case for inadvertent or incidental contacts or communications with minors. The no contact order entered against Mr. Cobler precludes him from any contacts with an individual under the age of 18, whether, "in person or through another person or in writing or email, or by telephone, pager, or facsimile." (R., p.7.) The order also precludes him from attempting to make any contacts or any communications whatsoever. (R., p.7.)

There is nothing in the no contact order entered against Mr. Cobler that provides an exception where an individual under the age of 18 is the person to initiate the contact. (R., p.7.) As such, if Mr. Cobler were to ever make any response to a question or statement presented to him by someone under the age of 18, he is exposed to criminal liability for violation of his no contact order. *See* I.C. § 18-920. Likewise, there is no exception for any instance where Mr. Cobler would unknowingly be speaking or communicating in any way to an individual under the age of 18. And, as will be discussed more fully below, the plain terms of this order prevent Mr. Cobler from having contact with his own children, who are the most important people in Mr. Cobler's life and who have never been shown to be in any danger from Mr. Cobler. (R., p.7.)

The provisions of the no contact order entered against Mr. Cobler unjustifiably preclude a significant amount of constitutionally protected speech and related rights of association. In absence of any provision for inadvertent or incidental contacts, either for

the presence of minors or for contacts with minors, the no contact order entered against Mr. Cobler is unconstitutionally overbroad.

C. The District Court Failed To Act Within The Bounds Of Its Discretion When It Entered A No Contact Order Against Mr. Cobler Based On A Statute And Court Rule That Are Unconstitutionally Vague On Their Face And As Applied To Mr. Cobler

1. Prior Precedent From The Idaho Supreme Court Has Applied An Incorrect Standard For Facial Vagueness In The Context Of Criminal Statutes

As a preliminary matter, Mr. Cobler asks this Court to clarify the correct standard of review for facial vagueness challenges in the context of criminal statutes. Specifically, Mr. Cobler asks this Court to clarify that, in the context of criminal statutes, a facial vagueness challenge does not require a showing that the statute is unconstitutionally vague in all its applications, in light of U.S. Supreme Court precedent that holds.[3]

Generally, the doctrine of stare decisis requires a court to follow controlling precedent unless there is a compelling reason to depart from such precedent. *See, e.g., State v. Reyes*, 131 Idaho 239, 240, 953 P.2d 989, 990 (1998). Such reasons include where the controlling precedent is manifestly wrong; where it has proven over time to be unwise or unjust; or where overruling the precedent is necessary to vindicate plain, obvious principles of law and remedy continued injustice. *Id.* Current precedent

[3] This Court should also note that, even under the standard previously applied by Idaho courts from *Village of Hoffman Estates v. Flipside*, a showing that the challenged statute is unconstitutionally vague in all applications is not required when the statute being challenged as facially vague infringes on First Amendment rights. *See Village of Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 455 U.S. 489, 494-495, 497 (1982). Because, as previously noted, I.C. § 18-920 and I.C.R. 46.2 infringe on constitutionally protected First Amendment rights, this is an additional reason why Mr. Cobler may raise his facial vagueness challenge to this statute and court rule without being required to show vagueness in all applications.

from this Court regarding the proper analysis for a facial vagueness challenge to a criminal statute is manifestly wrong in that it is contrary to the express holdings of the United States Supreme Court. Overruling this precedent is also necessary to vindicate plain, obvious principles of law. As such, Mr. Cobler requests that this Court revisit its prior precedent and clarify that it is not necessary to demonstrate vagueness in all applications of a criminal statute in order to demonstrate that a criminal statute is unconstitutionally vague on its face.

Prior precedent from this Court concludes that, in order for a facial vagueness challenge to a criminal statute to be successful, the complainant must demonstrate that the law is impermissibly vague in all of its applications. *Korsen*, 138 Idaho at 712, 69 P.3d at 132; *State v. Hellickson*, 135 Idaho 742, 745, 24 P.3d 59, 62 (2001); *State v. Prather*, 135 Idaho 770, 773, 25 P.3d 83, 87 (2001); *State v. Leferink*, 133 Idaho 780, 784, 992 P.2d 775, 779 (1999); *State v. Cobb*, 132 Idaho 195, 199, 969 P.2d 244, 248 (1998); *State v. Bitt*, 118 Idaho 584, 587, 798 P.2d 43, 46 (1990). These decisions have universally relied upon the U.S. Supreme Court decision in *Village of Hoffman Estates v. Flipside,* 455 U.S. 489 (1982), as the source of this rule. *Korsen*, 138 Idaho at 712, 69 P.3d at 132; *Leferink*, 133 Idaho at 784, 992 P.2d at 779; *Cobb*, 132 Idaho at 199, 969 P.2d at 248; *Bitt*, 118 Idaho at 587, 798 P.2d at 46.[4] This reliance is misplaced because this specific standard from *Village of Hoffman Estates* has been expressly stated by the U.S. Supreme Court to be an improper rule in the context of facial vagueness challenges to a criminal statute. *Kolender v. Lawson*, 461 U.S. 352,

[4] While *Hellickson* and *Prather* cite to *Cobb* as the legal authority in support of this standard, the Court in *Cobb* cites to *Village of Hoffman Estates* as the legal authority for this rule. *Hellickson*, 135 Idaho at 746, 24 P.3d at 63; *Prather*, 135 Idaho at 773, 25 P.3d at 86;

358 (1983); *see also City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (plurality opinion).

The U.S. Supreme Court in *Village of Hoffman Estates* was called upon to address the issue of whether a local civil ordinance requiring businesses to obtain a license in order to sell certain classes of products was unconstitutionally vague on its face. *Village of Hoffman Estates*, 455 U.S. at 491-492. The ordinance at issue was civil, rather than criminal, in nature. *Id.* In the context of this civil statute, the Court held that, "a 'facial' challenge, *in this context*, means a claim that the law is 'invalid in toto – and therefore incapable of any valid application.'" *Id.* at 495, n.5 (quoting *Steffel v. Thompson*, 415 U.S. 452, 474 (1974)). The Court in *Village of Hoffman Estates* proceeded to clarify that this rule was a "less strict vagueness test" than would normally be applied because the ordinance was an economic regulation; and that the "degree of vagueness that the Constitution tolerates" depends upon the nature of the enactment. *Id.* at 498.

The U.S. Supreme Court has subsequently articulated that the standard from *Village of Hoffman Estates* that required a showing that the statute was vague in all of its applications is not the correct standard when the statute at issue is criminal. *Kolender*, 461 U.S. at 358. In *Kolender*, the Court articulated several reasons why this standard was inapplicable where the statute being challenged is a criminal statute. Importantly, the Court placed heavy emphasis on the fact that, where a statute imposes criminal penalties, "the standard of certainty is higher." *Kolender*, 461 U.S. at 358, n.8. In other words, the Court will require more definiteness to the language of criminal statutes in order to pass constitutional muster, and will correspondingly impose greater

scrutiny to claims that a criminal statute is unconstitutionally void for vagueness. As the Court noted, "this concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application." *Id.* The Court in *Kolender* also went on to note that the standard articulated in *Village of Hoffman Estates* can not be appropriately to facial vagueness challenges to criminal statutes because, "the ordinance in *Hoffman Estates* 'simply regulates business behavior,' and that 'economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow.'" *Id.* at 358 (quoting *Village of Hoffman Estates*, 455 U.S. at 499).

Prior Idaho precedent requiring a showing that a criminal statute is impermissibly vague in all its applications, and the corollary rule that a criminal statute cannot be unconstitutionally vague on its face if the Court can identify "core circumstances" to which the statute may be lawfully applied, is directly contrary to the express holding of the U.S. Supreme Court regarding the proper standard for facial vagueness challenges to a criminal statute. As such, the line of cases articulating this standard are manifestly wrong because this standard has been expressly rejected by the United States Supreme Court, and this line of cases should be overruled in order to vindicate plain, obvious principles of law.

2. The Statute And Court Rule Governing Criminal No Contact Orders Are Unconstitutionally Vague On Their Face

Mr. Cobler asserts that the statute and court rule governing criminal no contact orders are not worded with sufficient clarity and definiteness such that an ordinary person could understand what conduct is prohibited. He further asserts that I.C. § 18-

920 and I.C.R. 46.2 are worded in such a manner that they permit discriminatory and arbitrary enforcement. As such, I.C. § 18-920 and I.C.R. 46.2 are unconstitutionally vague on their face.

The void for vagueness doctrine is rooted in the Due Process clause of the Fourteenth Amendment. *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001); *Korsen*, 138 Idaho at 711, 69 P.3d at 131. Under this doctrine, a statute or ordinance must "be worded with sufficient clarity and definiteness that ordinary people can understand what conduct is prohibited and that the statute be worded in a manner that does not allow arbitrary and discriminatory enforcement." *Korsen*, 138 Idaho at 711. As part of the guarantee of due process, no individual may be required to speculate as to the meaning of a statute where they face the potential loss of liberty as a result.[5] *Id.*

The due process clause guarantees that individuals be informed of what the law commands or forbids, such that persons of common intelligence will not be forced to guess at the meaning of the criminal law. *Id.* at 712, 69 P.3d at 132. There are two primary components to this guarantee: first, that a statute must give adequate notice to people of ordinary intelligence as to the conduct proscribed; and second, that the statute must establish some minimal guidelines to govern those charged with enforcing the statute. *Id.* Neither requirement is met with regard to I.C. § 18-920 or I.C.R. 46.2.

The extent of the conduct proscribed is indiscernible under the language of I.C. § 18-920. The action prohibited by the statute is having "contact with the stated person in violation of an order." I.C. § 18-920(2)(c). As previously noted, there is

[5] This Court should note that I.C. § 18-920 provides that, if a defendant violates the terms of the order, he or she may be fined up to $1,000 or imprisoned for up to one year. I.C. § 18-920(4). As such, a person faces the potential loss of liberty if he or she violates the terms of I.C. § 18-920.

nothing in this statute or the provisions of the title in which the statute is situated that in any way defines what constitutes "contact." *See* I.C. § 18-101, et seq. Similarly, I.C.R. 46.2 also does not contain a definition of "contact." Moreover, the terms of I.C. § 18-920 do not appear to require that the contact be accompanied by any specific mental state on the part of the defendant; a violation occurs strictly when the person against whom the order is entered "has had contact with the stated person in violation of an order." I.C. § 18-920(2)(c).

In absence of any definition to provide guidance as to what is proscribed as a "contact," a person of ordinary intelligence would necessarily have to guess as to what conduct could potentially expose him or her to criminal liability. The statute and rule do not set out whether inadvertent or incidental contacts are punishable as a violation of the no contact order. There is also no way of determining whether communication that is merely received, but not responded to, by the person subject to the no contact order would count as a contact. Given that the State seeks to apply no contact orders to preclude contacts with entire classes of persons, it is virtually impossible for a person of ordinary intelligence to be able to discern what is permitted and what may be viewed as criminal under the provisions I.C. § 18-920 and I.C.R. 46.2.

Because there are no substantial parameters on what constitutes a "contact" under I.C. § 18-920 and I.C.R. 46.2, the potential for arbitrary or discriminatory enforcement is very high. Adding to that potential is the fact that a criminal no contact order may be entered when a defendant has been charged or convicted of *any* offense so long as the district court finds that a no contact order is "appropriate." I.C. § 18-920(1). This vests this district court with unfettered discretion in making the

determination as to when a no contact order is appropriate. Additionally, there is no requirement of any relation between the person with whom the defendant is precluded from contacting and the underlying charge. I.C. § 18-920. A criminal statute is void for vagueness if the statute fails to provide minimal guidelines to govern law enforcement such that the statute's language "allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). Idaho Code § 18-920 and I.C.R. 46.2 provide no meaningful guidelines to govern those charged with executing the statute and places unlimited discretion in the hands of those charged with executing and enforcing these provisions. Therefore this statute and court rule are unconstitutionally vague.

The statute and rule governing no contact orders do not provide sufficient guidance as would provide a person of ordinary intelligence the ability to discern what conduct is permitted and what conduct is potentially criminal. Additionally, I.C. § 18-920 and I.C.R. 46.2 provide absolutely no meaningful guidelines to govern the courts regarding proper execution and enforcement of these provisions. As such, I.C. § 18-920 and I.C.R. 46.2 are unconstitutionally vague.

3. The Specific Terms Of The No Contact Order Entered Against Mr. Cobler Are Unconstitutionally Vague As Applied The Facts And Circumstances Of This Case

Mr. Cobler next contends that the specific terms of the no contact order that was entered against him by the district court are impermissibly vague and fail to provide him fair notice as to what conduct is proscribed. As currently written, the no contact order entered against Mr. Cobler will be nearly impossible to comply with upon his release back into the community and this near impossibility of compliance creates the potential

for police to have unbridled discretion in determining whether to arrest him for a violation of the order.

When a defendant asserts that a statute is vague as applied to the facts of his or her particular case, he or she must demonstrate that the statute "failed to provide fair notice that the defendant's conduct was proscribed or failed to provide sufficient guidelines such that the police had unbridled discretion in determining whether to arrest him." *Korsen*, 138 Idaho at 712, 69 P.3d at 132.

The specific provisions of the no contact order entered against Mr. Cobler demonstrate, in stark clarity, the vagueness of the scope of criminal no contact order that continues to be in place against him. As noted in the earlier discussion of the overbreadth of the order, Mr. Cobler's no contact order applies to a very broad class of persons: anyone who is under the age of 18. (R., p.7.) The order and the statute that authorized its entry have no language requiring any particular mental state that accompanies the alleged contact. I.C. § 18-920. (R., p.7.) There are no provisions regarding inadvertent or incidental contacts. (R., p.7.) There are no provisions regarding the passive receipt of a message or contact that has been initiated by another person who is under the age of 18. (R., p.7.)

It is entirely possible that Mr. Cobler could be in technical violation of this order if he calls to order a pizza and speaks to an individual who has not yet turned 18, even if Mr. Cobler were entirely unaware of this fact. He would also likely find himself in violation of this order if he goes to the grocery store, any fast food restaurant, or indeed any establishment that could employ a person who is under the age of 18. The terms of his no contact order would essentially require Mr. Cobler to never leave his home and

enter a public place lest he inadvertently have contact with someone who has not yet turned 18 years old. Similarly, if a telemarketer were to call Mr. Cobler, and the telemarketer is under the age of 18, Mr. Cobler would technically be in violation of the no contact order by the simple act of picking up his phone.

It is of no accord that actual prosecution for such violations would be unlikely. The crucial fact with regard to this order is that, under the scope of the order as it exists now, Mr. Cobler would have no meaningful way of determining in advance what constitutes a violation and what does not. Additionally, he would be entirely at the mercy of the discretion of any police officer or prosecutor should he be mistaken as to what is prohibited under this order. Under these facts, the no contact order entered against Mr. Cobler is clearly unconstitutionally vague in that it fails to provide fair notice as to the conduct proscribed and fails to provide any guidelines limiting discretion in determining whether to arrest him for a violation. See *Kolender*, 461 U.S. at 360-362.

D. The District Court Failed To Act Within The Bounds Of Its Discretion When It Entered A No Contact Order Against Mr. Cobler That Is An Unconstitutional Infringement Upon His Fundamental Rights As A Parent, And When The District Court Denied Mr. Cobler's Motion To Modify The No Contact Order

1. Summary Entry Of The No Contact Order Against Mr. Cobler Violated His Fundamental Rights As A Parent

Mr. Cobler asserts that the no-contact order entered against him in this case is an unconstitutional interference with his fundamental rights as a parent. Moreover, because the no-contact order in this case was issued summarily by the district court during Mr. Cobler's video arraignment, with no substantial consideration of whether the State had established by clear, cogent, and convincing evidence that this order was

needed for the protection of Mr. Cobler's children, the no contact order in this case also violated Mr. Cobler's due process rights.

The right of parents to make decisions regarding the care, custody, and control of their children has been recognized by the U.S. Supreme Court and the Idaho Supreme Court as a fundamental right. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Leavitt v. Leavitt*, 142 Idaho 664, 670, 132 P.3d 421, 427 (2006). The Due Process Clause of the Fourteenth Amendment provides heightened protections against governmental interference where fundamental rights and liberty interests are at stake. *Troxel*, 530 U.S. at 65. The interest of parents in the care, custody, and control of their children is "perhaps the oldest of the fundamental liberty interests," recognized by the courts. *Id.* This interest includes the right of parents to "establish a home and bring up children." *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). A strict prohibition against a parent having any contact whatsoever with his or her child is necessarily an interference with this fundamental right. As such, the imposition of the no contact order issued in this case is subject to the strict requirements of due process since the terms of that order interfere with Mr. Cobler's fundamental rights as a parent.

The Idaho Supreme Court has established that the State may not interfere with the exercise of the fundamental rights of a parent absent clear and convincing proof that the State's action is necessary for the protection or best interests of the child. *In the Interests of Doe*, 144 Idaho 534, 164 P.3d 814 (2007) (State action terminating a parent's rights must be supported by clear and convincing evidence); *Leavitt*, 142 Idaho at 670, 132 P.3d at 427 (applying clear and convincing evidence standard to decisions regarding the visitation rights of grandparents); *see also Santosky v. Kramer*, 455 U.S.

745, 747-748 (1982). Here, the State presented no such proof in support of the issuance of a no contact order that prohibited Mr. Cobler from engaging in nearly any exercise of his fundamental rights to parent his children.

At his arraignment, the district court was made aware of two of Mr. Cobler's three minor children. (10/17/06 Tr., p.5, L.8.) The State asked for a no-contact order against Mr. Cobler that prevented him from having contact "with the victim or any minor children *until the risk can be assessed.*" (10/17/06 Tr., p.6, Ls.9-11 (emphasis added).) The court initially stated that it would only order no contact with the alleged victim. (10/17/06 Tr., p.7, Ls.6-8). However, despite knowing that Mr. Cobler had children that could be impacted by this order, the district court ultimately entered a no contact order that included both the alleged victim and "all minors." (R., p.7.)

What is striking about this no contact order, beyond the fact that it presented an absolute bar against Mr. Cobler maintaining any and all contacts with his own children, is that the district court refused to permit any exceptions even for emergency situations. (R., p.7.) One of the enumerated exceptions denied by the district court was a provision that would have permitted Mr. Cobler to "respond to emergencies involving the natural or adopted children of both parties." (R., p.7.) As such, the district court's action in entering this order not only prevented Mr. Cobler from maintaining any contact with his own children, it also specifically denied him the right to respond to any exigencies that might otherwise arise with his children.

In contrast to the near absolute deprivation of Mr. Cobler's parental rights is the complete absence of any specific justification therefore. The State requested this order be entered so that risk could be "assessed." (10/17/06 Tr., p.6, Ls.9-11.) This

statement is essentially an admission that the State had no substantial basis upon which to conclude that Mr. Cobler presented a threat to any person, much less to his own children. This falls far below the standard of clear and convincing proof that the no contact order was necessary for the protection or best interests of Mr. Cobler's children. The State also made no representations regarding Mr. Cobler's fitness as a parent or in any way implicated that his children were somehow at risk if they would be permitted to have contact with their father. (10/17/06 Tr., p.4, L.1 – p.7, L.12.)

In light of the fact that no evidence was presented that the no contact order was necessary for the protection of Mr. Cobler's children, the State has violated Mr. Cobler's fundamental rights as a parent by entering a no contact order that precluded Mr. Cobler from all contacts with his children, and specifically denied him the ability to respond to emergency situations.

This conclusion is supported by the findings of other jurisdictions regarding the constitutional pre-requisites for proper entry of a no-contact order that prohibits a parent from maintaining contact with his or her children. Regarding the entry of no contact orders preventing parents from contacting their children, Washington courts have held that the fundamental right to parent can be constitutionally restricted by a condition of a criminal sentence only if the condition is reasonably necessary to prevent harm to the children. *See State v. Ancira*, 27 P.3d 1246, 1248 (Wash. Ct. App. 2001); *State v. LeTourneau*, 997 P.2d 436, 445 (Wash. Ct. App. 2000). Notably, the court in *LeTourneau* concluded that merely being charged or convicted of a sexual offense was insufficient to prevent a parent from having unsupervised conduct with his or her children in absence of a specific showing that there was evidence that the defendant

was a pedophile or posed a danger of molesting her children. *LeTourneau*, 997 P.2d at 446. Washington courts apply this standard to the imposition of no contact orders against a parent. *Ancira*, 27 P.3d at 1248. This Court should note that there was a specific finding in the psychosexual evaluation that Mr. Cobler is not a sexual predator. (Psychosexual Evaluation (attached to PSI), p.13.) While the evaluation determined that Mr. Cobler is attracted to adolescent females, the report noted that such attraction is "not unusual for his gender and age group." (Psychosexual Evaluation, p.13.)

In light of established precedent regarding the fundamental rights of a parent, and persuasive precedent specifically addressing criminal no contact orders that interfere with this right, the district court violated Mr. Cobler's fundamental constitutional rights as a parent, and his Due Process rights flowing therefrom, when it summarily entered the no contact order at issue in this case.

2. Summary Denial Of The Motion To Modify The No Contact Order Entered Against Mr. Cobler Violated His Fundamental Rights As A Parent

As previously noted, the State may not interfere with the exercise of the fundamental rights of a parent absent clear and convincing proof that the State's action is necessary for the protection or best interests of the child. *In the Interests of Doe*, 144 Idaho at 536, 164 P.3d at 816; *Leavitt*, 142 Idaho at 670, 132 P.3d at 427; *Santosky*, 455 U.S. at 747-748. Here, the district court summarily denied Mr. Cobler's motion to modify the no contact order which specifically brought to the court's attention that this order precluded Mr. Cobler from maintaining any contact with his children. (Motion to Modify Protection Order, pp.1-3.) The district court did not provide any reasoning or justification for this denial, and certainly does not appear to have considered whether

there was clear and convincing proof that continuation of the no contact order is necessary for the protection or best interests of the child. (Motion to Modify Protection Order, pp.1-3.) As such, the district court abused its discretion when it denied Mr. Cobler's motion to modify the no contact order because the district court failed to act within the bounds of applicable law.

E. The District Court Failed To Act Within The Bounds Of Its Discretion When It Entered A No Contact Order Against Mr. Cobler That Is Invalid Because It Contains No Discernible Date Of Expiration

Mr. Cobler contends that the no contact order entered against him is invalid because it contains no discernible date of expiration. The no contact ordered entered by the district court in this case states that the order expires "upon dismissal of this case." Because dismissal was stated as the condition precedent to the order expiring, and because no dismissal ever occurred in this case, there is no relevant date of expiration. Mr. Cobler contends that the no contact order entered against him is invalid because it contains no discernible date of expiration.

This Court exercises free review over the question of whether a criminal no contact order is entered in compliance with relevant statutes and court rules. *State v. Castro*, ___ Idaho ___, ___ P.3d ___, 2008 WL 204309, *2 (2008). Idaho Code § 18-920 permits the district court to enter a criminal no contact order when a defendant is charged with or convicted of one of the enumerated offenses or any offense for which the court finds that the no contact order is appropriate. I.C. § 18-920(1). Idaho Criminal Rule 46.2 sets out the procedural requirements for entering a no contact order as authorized by I.C. § 18-920. In 2004, the Idaho Supreme Court changed the language of I.C.R. 46.2 to require inclusion of a termination date. *Castro*, 2008 WL 204309 at *3.

In explaining this change, the Idaho Supreme Court explained that it was contrary to the interests of public policy to permit criminal no contact orders to remain in "enshrined perpetuity," while a defendant waits for the district court to terminate the order at some unknown point in the future. *Id.* In order to prevent this, the Court in *Castro* stated that it expected district courts in the future to provide a discernible termination date for no contact orders entered under I.C. § 18-920. *Id.*

Here, the form used by the district court does not comply with requirement that the order contain a specific date of expiration. (R., p.7.) Perhaps misreading the language of I.C.R. 46.2, the form provides two check boxes: one for expiration on a specific date, and one for expiration upon dismissal of the case. (R., p.7.) The district court checked only the box providing for expiration upon dismissal of the case. (R., p.7.) Given that there was no dismissal of Mr. Cobler's criminal case, the district court's actions resulted in exactly the harm that the 2004 revisions of I.C.R. 46.2 sought to avoid – the entry of a no contact order that extends into perpetuity.

The *Castro* Court has made clear that this result is exactly what was sought to be avoided when the Court amended I.C.R. 46.2 to require a termination date. The decision to amend the language of I.C.R. 46.2 was intended to require mandatory inclusion of an end date in no contact orders. *Castro*, 2008 WL 204309 at *3. While the wording of I.C.R. 46.2 stated that the order must contain a statement that it will expire on 11:59 p.m. on a specific date, *or upon dismissal of the case*, the language regarding dismissal of the case was clearly not intended to provide a mechanism to avoid the requirement of stating a definite date of termination in light of the Court's strong language in *Castro*. Applying the rule of lenity, and the Supreme Court's stated

reasoning behind the modification to I.C.R. 46.2, the only reasonable interpretation of this provision is that the no contact order is valid until the mandatory stated date of expiration, unless the district court dismisses the case before the date of expiration.

In light of the reasoning behind I.C.R. 46.2 as stated in *Castro*, the no contact order entered by the district court is invalid because it fails to contain a specific date of expiration.

F. The District Court Failed To Act Within The Bounds Of Its Discretion When It Entered A No Contact Order Against Mr. Cobler That Is Invalid Because It Contains A Prohibition Against Contacts With A Class Of Persons Rather Than Just A Named Person

Mr. Cobler asserts that, because the no contact order was entered against contacts of a class of persons, rather than just an individual person, the no contact order unlawfully exceeded the scope of the authority conferred under I.C. § 18-920. While the no contact order issued in this case does contain one named person against whom contact is prohibited, the alleged victim in this case, the order proceeds to prohibit contacts against a very broad class of persons: all minors. (R., p.7.) The provision forbidding all contact with all minors is outside the scope of what contacts may be lawfully prohibited pursuant to I.C. § 18-920.

Under the language of I.C. § 18-920, the court may issue a criminal no contact order "forbidding contact with *another person*." I.C. § 18-920(1) (emphasis added). In describing what constitutes a violation of a no contact order, this statute further states that the person charged with violating the order must have "had contact with the *stated person* in violation of the order." I.C. § 18-920(2)(c) (emphasis added). This language

clearly limits the scope of whom no contact orders may be entered in favor of to individual persons, and not classes of persons.

This interpretation is consistent with the common definition of "person." A "person" is commonly defined as a human or an individual. *See* Merriam-Webster Online, *http://www.merriam-webster.com/dictionary/person*. This also comports with the general legal understanding of the term "person" as "a human being." Black's Law Dictionary 1178 (Bryan Garner, ed., 8th ed., West 1999). Moreover, the rule of lenity requires that criminal statutes must be strictly construed in favor of the defendant. *See, e.g., State v. Sivak*, 119 Idaho 320, 325, 806 P.2d 413, 418 (1990). Applying a strict construction to the language of I.C. § 18-920, no contact orders may only be issued if they prohibit the defendant from contacting an individual person. There is no authorization for entering a no contact order prohibiting contact against an entire class of persons, particularly not one so broad as "all minors."

The no contact order in this case is invalid to the extent that it prohibits contacts with a class of persons rather than just a stated individual. As such, the district court abused its discretion when it refused to modify the no contact order as requested by Mr. Cobler.

G. Conclusion

The no contact order entered against Mr. Cobler by the district court is unconstitutionally vague and overbroad; and also violates Mr. Cobler's fundamental constitutional rights as a parent. The no contact order at issue in this case is also invalid because it contains no date of expiration and is entered in favor of a class of

persons rather than a named person. As such, the district court abused its discretion when it entered this order, and when it denied Mr. Cobler's motion to modify the order.

II.

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Ten Years, With Two Years Fixed, Upon Mr. Cobler Following His Plea Of Guilty To Sexual Battery Of A Minor Child, Sixteen Or Seventeen Years Of Age

Mr. Cobler asserts that, given any view of the facts, his unified sentence of ten years, with two years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence the appellate court will conduct an independent review of the record, giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771, 653 P.2d 1183 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294, 939 P.2d 1372, 1373 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577, 602 P.2d 71, 75 (1979)). Mr. Cobler does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Cobler must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145, 814 P.2d 401, 405 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385, 825 P.2d 482 (1992)). The governing criteria, or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* (quoting *State v. Wolfe*, 99 Idaho

382, 384, 582 P.2d 728, 730 (1978)). This Court reviews the length of the entire sentence on review of whether that sentence is excessive. *State v. Oliver*, 144 Idaho 722, 725, 170 P.3d 387, 391 (2007).

Mr. Cobler was the victim of a violent and unstable childhood. (PSI, pp.11-12.) He spent much of his formative years in foster care and in group homes. (PSI, p.11.) His mother neglected him when he was very young, and most of the care he received was from his aunts, uncles, and his grandmother. (PSI, p.11.) His father was not present in Mr. Cobler's life until he was eight years old. (PSI, p.11.) From this time on, Mr. Cobler appears to have been bounced around from home to home without much stability or guidance for any significant period of time. (PSI, p.11.)

Mr. Cobler lived with his father for several years. (PSI, p.11.) He was mentally and physically abused by his father from the time he was eight until he was 14 years old. (PSI, p.11.) His father would often beat and choke Mr. Cobler, breaking his nose on more than one occasion. (PSI, p.11.) Mr. Cobler's father also hit him over the head with a cinder block. (PSI, p.11.)

Mr. Cobler appeared to have one year of respite from his history of neglect and abuse when he was sent to live with his aunt and his grandmother. (PSI, p.11.) However, that period was short-lived, and he was returned to his mother's custody. (PSI, p.11.) He lived with his mother and her boyfriend for only a short time as a teenager. (PSI, p.11.) Mr. Cobbler's mother was an alcoholic who drank frequently during the time that Mr. Cobbler lived with her. (PSI, p.12.) He was abused and neglected while in his mother's custody. (PSI, p.11.) Mr. Cobler's mother also placed him in a mental hospital. (PSI, p.11.) Sadly, Mr. Cobler recalls this mental hospital as

one of the first non-abusive environments that he had ever known as a child. (PSI, p.12.) Shortly thereafter, Mr. Cobler was removed from his mother's home due to the neglect and abuse that he suffered under her care. (PSI, p.11.) He spent time in a group home, and then was placed in his aunt's care until he turned 18. (PSI, p.11.)

Mr. Cobler's judgment was impaired by marijuana when he first engaged sexually with the victim, and he was not aware until several months later that she was younger than 18 years old. (PSI, p.9.) Moreover, an examination of Mr. Cobler's criminal history demonstrates that he has no prior record of any sexual offense, and it is unclear whether Mr. Cobler has any record of prior felony offenses.[6] (PSI, p.10.)

Despite his own history of abuse at the hands of his parents, or perhaps because of it, Mr. Cobler is a man who is dedicated to his family. The most important value to Mr. Cobler is family. (PSI, p.19.) He has repeatedly emphasized his love for his wife and his children. (PSI, pp.19-20.) Mr. Cobler also has expressed his remorse to the court for the harm that his actions have caused, including the harm suffered by the members of his family. (PSI, pp.19-20.)

Mr. Cobler's behavior in this case is partially attributable to his poor impulse control and his attention deficit hyperactivity disorder. (Psychosexual Evaluation, pp.3-4.) Although not a defense to his crime, Mr. Cobler was also unaware that the victim in this case was under the age of 18. (PSI, p.4.)

Moreover, Mr. Cobler has not had the opportunity to participate in any psychological counseling or therapy as an adult, and received only intermittent mental

[6] Mr. Cobler appears to have two prior convictions from Kansas for possession of marijuana and criminal trespass. However, the PSI does not indicate whether these offenses were felonies or misdemeanors. (PSI, p.10.) These offenses appear to be self-reported by Mr. Cobler. (PSI, p.11.)

health treatment as a teenager. (Psychosexual Evaluation, p.5.) Given the history of violence that Mr. Cobler endured during his formative years, it is not surprising that his psychosexual evaluation indicated that mental health therapies could be a useful tool for Mr. Cobler's rehabilitation. (Psychosexual Evaluation, pp.16-18.)

Moreover, Mr. Cobler's psychosexual evaluation indicates that any danger that Mr. Cobler presents to society could likely be ameliorated through outpatient treatment rather than incarceration. His evaluation indicated that he was at only a moderate risk of reoffense, but further stated that this risk could be significantly reduced if Mr. Cobler participated in treatment. (Psychosexual Evaluation, p.13.) The psychosexual evaluation also concluded that Mr. Cobler is not a sexual predator; a conclusion that is supported by his lack of any prior similar offenses in his criminal record. (Psychosexual Evaluation, pp.15-16.) Based on an assessment of relevant factors, the evaluation concluded that Mr. Cobler was "a good candidate for outpatient specialized sexual offender treatment," and further stated that his rehabilitation through treatment could be done on an outpatient basis while Mr. Cobler was released into the community. (Psychosexual Evaluation, pp.15-16.)

Under any reasonable view of the facts, the information before the district court at sentencing indicates that Mr. Cobler was not such a danger to the public at large that a unified sentence of ten years, with two years fixed, was required. In fact, it appears that the protection of society and the potential for Mr. Cobler's successful rehabilitation would both be served by his participation in outpatient mental health and sexual offender treatments that could be provided upon his release into the community. Because the district court's sentence was excessive in light of the relevant statutory

factors and the facts of this case, the district court abused its discretion when it sentenced Mr. Cobler to ten years, with two years fixed.

III.

The District Court Abused Its Discretion When It Denied Mr. Cobler's Rule 35 Motion For A Reduction Of Sentence

A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Trent*, 125 Idaho 251, 253, 869 P.2d 568, 570 (Ct. App. 1994) (citing *State v. Forde*, 113 Idaho 21, 740 P.2d 63 (Ct. App.1987) and *State v. Lopez*, 106 Idaho 447, 680 P.2d 869 (Ct. App. 1984)). "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *Id.* (citing *Lopez*, 106 Idaho at 450, 680 P.2d at 872). "If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction. *Id.* (citing *State v. Hernandez*, 121 Idaho 114, 822 P.2d 1011 (Ct. App. 1991)).

As an initial matter, this Court should note that Mr. Cobler's Rule 35 motion for reduction of his sentence was supported by new and additional information. In his Rule 35 motion, Mr. Cobler repeatedly asserted his honest remorse for his actions and accepted responsibility for his crime. (Motion for Correction or Reduction of Sentence, pp.1-8.) This demonstrates that Mr. Cobler made the important realization as to the harms of his actions, and further demonstrates Mr. Cobler's progress towards his rehabilitation.

Mr. Cobler also provided the district court with a report on the considerable progress that he had made during his time of incarceration. He reported that he had no infractions and was a model prisoner during his entire time of incarceration. (Motion for Correction or Reduction of Sentence, p.7.) Mr. Cobler also informed the district court that he had signed up for all of the recommended classes and had made substantial progress in several courses already. (Motion for Correction or Reduction of Sentence, p.7.) Many of these courses focused upon long-term changes to Mr. Cobler's thinking and behavioral patterns, and the information that Mr. Cobler has gleaned from these courses will no doubt help to ensure that he does not commit any similar offenses in the future. (Motion for Correction or Reduction of Sentence, p.7.) Moreover, Mr. Cobler's sincere desire to one day be reunited with his family has also been an important motivator since his time of incarceration that drives him to seek to permanently change his life and his behavior for the better. (Motion for Correction or Reduction of Sentence, p.7.)

The new and additional information provided to the district court, along with the record as a whole in this case, demonstrates that Mr. Cobler is not such a significant threat to the community that a sentence of ten years, with two years fixed, is either necessary or appropriate in this case. Moreover, a reduction of Mr. Cobler's sentence is also appropriate in light of the related factors of rehabilitation, retribution and deterrence. As such, the district court abused its discretion when it denied Mr. Cobler's Rule 35 motion for a reduction of his sentence.

CONCLUSION

Mr. Cobler respectfully requests that this Court vacate the no contact order entered against him. Mr. Cobler further respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that the order denying his Rule 35 motion be vacated and the case remanded to the district court for further proceedings.

DATED this 10th day of April, 2008.

SARAH E. TOMPKINS
Legal Intern

SARA B. THOMAS
Chief, Appellate Unit

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th day of April, 2008, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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